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Nos. 95-1245
95-1276

In The

Supreme Court of the United States

October Term, 1995

DAVID J. STEINBERG,
MARVIN ZOLT, AND ZOLT & LOOMIS, P.C.,
Petitioners,

v.

J. REID BINGHAM, as Ancillary Administrator of the
ESTATE OF ROBERT NESTA MARLEY,
Respondent.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Did the Second Circuit err when it held Respondent's RICO claim timely as to injuries suffered within four years before suit?

2. Are RICO's "pattern" and "enterprise" requirements unconstitutionally vague as applied to defendants found guilty of multiple schemes involving innumerable acts of wire fraud, mail fraud, and interstate transport of stolen property over a five year period?

3. Did the district court abuse its discretion or commit any procedural error worthy of review?

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ON PETITIONS FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

TO THE HONORABLE SUPREME COURT:

Respondent J. Reid Bingham, as Ancillary Administrator of the Estate of Robert Nesta Marley, submits this brief in opposition to the Petition for a Writ of Certiorari submitted by David J. Steinberg (the "Steinberg Pet.") and the Petition for a Writ of Certiorari submitted by Marvin Zolt and Zolt & Loomis, P.C. (the "Zolt Pet.").

STATEMENT OF THE CASE

Respondent respectfully refers the Court to the factual narrative contained in the Second Circuit's opinion, *Bingham v. Zolt*, 66 F.3d 553 (2d Cir. 1995), *petitions for cert. filed*, 64 U.S.L.W. 3561 (U.S. Feb. 5, 1996) (No. 95-1245), 64 U.S.L.W. 3561 (U.S. Feb. 9, 1996) (No. 95-1276) (Steinberg Pet. at 1a to 28a; Zolt Pet. App. A), for a complete statement of the applicable facts. The following are some key facts bearing upon the appropriateness of review.

Petitioners, a lawyer, an accountant, and the accountant's accounting firm, were adjudged guilty of conducting a complex and varied series of fraudulent schemes. Using their positions as fiduciaries, they successfully conspired to remove valuable assets and divert millions of dollars from the estate of the late reggae musician Robert Nesta (Bob) Marley (the "Marley Estate") over a five year period. The jury found Petitioners liable for multiple violations of RICO, fraud, and breach of fiduciary duty.[1]

The details of the Petitioners' principal schemes are set out in the Second Circuit's opinion. *Bingham*, 66 F.3d at 557-58 (Steinberg Pet. at 4a-6a). Through their schemes, Petitioners, *inter alia*, employed forged back-dated share transfers and assignments to take companies and assets out of the Marley Estate and diverted periodic royalty and other payments owed to the Marley Estate over a five year period,

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1. Petitioner Zolt's suggestion (Zolt Pet. at 4 n.1) that Steinberg and he were not adjudged liable for diverting Estate assets to themselves is incorrect. The record demonstrated that Petitioners helped themselves to well in excess of $ 1 million in unauthorized "fees" incurred in implementing their various fraudulent schemes, as compared to the ten to fifteen thousand dollars a year they received from Bob Marley prior to his death.

from 1981 to 1986, until shortly before Respondent filed suit in December, 1986. Through these schemes, Petitioners received royalty payments and other income on a continual basis over this period and, instead of turning these monies over to the Estate, funnelled and transported them from Philadelphia to New York City through and between their own bank accounts, those of various corporate entities, and one set up in the name of Bob Marley's wife.

Petitioners misstate the record in at least two critical respects. First, in the special verdict sheet, the jury was asked whether the Marley Estate had actual knowledge of Petitioners' wrongful acts by December 10, 1982. The jury answered this question in the affirmative. But contrary to Petitioners' arguments (*e.g.* Zolt Pet. at 9), the jury did not find -- and indeed could not have found -- that the Marley Estate had knowledge of <u>all</u> of Petitioners' wrongful acts before that date. (*See* Zolt Pet. at 6 (quoting verdict sheet).)

Although the mechanics of some of Petitioners' schemes may have been completed prior to December 1982, the constant diversions of royalties and other funds owed to the Marley Estate continued for a long time thereafter, each diversion constituting a separate and new instance of mail fraud, wire fraud, or transportation of stolen property. The Second Circuit based its decision on the fact that these ongoing diversions constituted additional wrongful acts which caused new and independent injuries to the Marley Estate within the four year limitation period:

> [T]he instant case . . . involves a continuing series of fraudulent actions undertaken to divert and conceal assets and income. A variety of schemes were employed, involving frequent misappropriations of discrete amounts of money from different sources. . . . Defendants were found guilty of funnelling royalty checks out of the estate from the time of Marley's

> death to the commencement of this litigation, and each illegal diversion constituted a new and independent legally cognizable injury to the estate.

Bingham, 66 F.3d at 561 (Steinberg Pet. at 15a).

Second, after the jury had adjudged Petitioners liable for damages, the special verdict sheet required it to state during what time periods the damages it awarded had been suffered by the Marley Estate. The jury indicated that all of the damages it awarded were suffered in periods after December 31, 1982, i.e. within the four years immediately prior to when the action was commenced. (*See* Zolt Pet. at 9-10 n.2 (quoting verdict sheet).)

Petitioners are thus wrong to suggest that the injuries for which the jury awarded damages were not suffered within four years of suit.

As the Second Circuit recognized, the only natural interpretation of the verdict is that the jury awarded damages for independent injuries resulting from diversions of funds after December 31, 1982, i.e. for injuries caused by predicate acts committed within the four year limitation period.[2] This is further demonstrated by the fact that the jury awarded a relatively small percentage of the demonstrable damages suffered by the Marley Estate.[3] Although Petitioners now

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2. Contrary to Petitioner Zolt's contention (Zolt Pet. at 6), for which he cites no record support, there was never an agreement that a finding of knowledge on or before December 10, 1982 would bar the RICO claim in its entirety.

3. The Estate calculated that $13.4 million in funds had been diverted from the Marley Estate from 1981 to 1986, including $10.5 million in royalties generated and received after Bob Marley's death. Allowing for various credits, the Estate sought a total of $9.7 million in compensatory damages plus $1 million in consequential damages.

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apparently believe that the special verdict sheet was improperly drafted (*e.g.* Zolt Pet. at 9 n.2), they waived this objection by failing to raise it when they had the opportunity to do so before the jury began its deliberations.

REASONS FOR DENYING THE WRIT

SUMMARY OF ARGUMENTS

Most of the issues raised by Petitioners are based on allegations that they were treated unfairly or that the lower courts abused their discretion -- matters that do not remotely merit review. In addition, the factual record of Petitioners' sustained theft of assets and income over a five year period up to the time of suit neither lends itself to resolving any division of authority in the courts of appeals relating to RICO accrual nor raises any issue as to the constitutionality of RICO's pattern and enterprise requirements.

This case is not an appropriate vehicle for the Court to resolve the variations on the RICO accrual rule because the facts are unique and Petitioners' arguments depend upon a tortured reading of verdict sheets to which they failed to object. The only natural reading of the verdict sheet demonstrates that the claims would have been timely under any known accrual test. The particular facts of this case do not permit examination of the issues on which the lower courts have differed.

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Bingham, 66 F.3d at 558 (Steinberg Pet. at 8a). The jury awarded a total of only $1,050,000 in compensatory damages, plus $1,000,000 against Petitioner Steinberg in punitive damages. The punitive damages were later reduced to $250,000 in light of the treble damage award on the RICO claims. *Id.* (Steinberg Pet. at 9a).

The circuits have universally rejected constitutional challenges to RICO's pattern and enterprise requirements, and this Court has routinely declined to review this issue. The courts have had little trouble applying this Court's guidance concerning the application of these RICO elements. Petitioners do not and could not show that there was any unfairness in applying RICO to them, considering the flagrant and wide-ranging nature of their illegal conduct.

Petitioners' other purported grounds for certiorari are based on asserted procedural errors. None of these even purports to involve a division of authority, an unsettled area of the law, plain error, or any important policy matter worthy of the Court's attention.

ARGUMENT AND AUTHORITIES FOR DENYING THE WRIT

I. REVIEW OF THE RICO ACCRUAL ISSUE WOULD SERVE NO PURPOSE.

A. This Case Offers No Opportunity To Consider Any Issue On Which The Circuits Are Divided

In *Grimmett v. Brown*, Nos. 94-16137, 94-16214, 1996 WL 29094 (9th Cir. Jan. 26, 1996)[4], the Ninth Circuit recently provided a useful summary of the law relating to when a RICO cause of action accrues. *See id.* at *2-*5. The Court's summary shows that there is more common ground than divergence among the principles applied in the various circuits.

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4. For the Court's convenience, copies of the *Grimmett* case have been lodged with the Clerk.

Without exception, the circuits that have considered the question of when a cause of action accrues under RICO base accrual on the discovery principle. However, an apparent conflict has arisen in relation to the question of what the plaintiff must actually or constructively discover before the limitations period will start to run. About half the circuits employ an "injury-based" discovery rule, holding that a civil RICO cause of action accrues when the plaintiff discovered or should have discovered his injury.[5] The other circuits follow an "injury and pattern-based discovery rule," holding that a cause of action accrues when the plaintiff discovered, or should have discovered not only the injury, but also that the injury was caused by conduct forming part of a pattern of racketeering.[6] Significantly, no circuit holds a RICO cause of action to accrue upon discovery of either individual predicate acts or the pattern of racketeering, without injury.[7]

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5. *See Rodriguez v. Banco Central*, 917 F.2d 664, 665-66 (1st Cir. 1990); *Bingham*, 66 F.3d at 559 (Steinberg Pet. at 11a), *Bankers Trust Co. v. Rhoades*, 859 F.2d 1096, 1102 (2d Cir. 1988), *cert. denied*, 490 U.S. 1007 (1989); *Pocahontas Supreme Coal Co. v. Bethlehem Steel Corp.*, 828 F.2d 211, 220 (4th Cir. 1987); *La Porte Constr. Co. v. Bayshore Nat'l Bank*, 805 F.2d 1254, 1256 (5th Cir. 1986); *McCool v. Strata Oil Co.*, 972 F.2d 1452, 1464-65 (7th Cir. 1992); *Grimmett v. Brown*, Nos. 94-16137, 94-16214, 1996 WL 29094 (9th Cir. Jan. 26, 1996).

6. *See Keystone Ins. Co. v. Houghton*, 863 F.2d 1125, 1130 (3d Cir. 1988); *Caproni v. Prudential Securities, Inc.*, 15 F.3d 614, 619-20 (6th Cir. 1994); *Granite Falls Bank v. Henrikson*, 924 F.2d 150, 154 (8th Cir. 1991); *Bath v. Bushkin, Gaims, Gaines & Jonas*, 913 F.2d 817, 820-21 (10th Cir. 1990); *Bivens Gardens Office Bldg. Inc. v. Barnett Bank of Fla., Inc.*, 906 F.2d 1546, 1553-55 (11th Cir. 1990), *cert. denied*, 500 U.S. 910 (1991).

7. Even the so-called split between jurisdictions following injury-based discovery rules and injury and pattern-based discovery rules is somewhat illusory. An examination of the leading cases in the

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Aside from the distinction between injury-based accrual and injury and pattern-based accrual, courts have crafted special rules or exceptions designed to prevent unfairness in particular circumstances. Recognizing that a pure discovery rule may sometimes lead to injustice where the predicate acts or injuries continue past the initial point of discovery, the courts (including the Second Circuit) generally apply a "separate accrual" rule. *See Grimmett*, 1996 WL 29094 at *3-*4. Under the principle of separate accrual, each time a plaintiff suffers a new and independent injury a new cause of action accrues, either when the plaintiff discovered or should have discovered the new injury (in injury-discovery circuits),[8] or when the plaintiff discovered or should have discovered that the independent injury was part of a pattern of racketeering (in injury and pattern-discovery circuits).[9]

As this overview makes clear, an area where this Court's guidance might arguably be useful relates to whether a RICO cause of action accrues upon discovery of the injury alone or

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Second Circuit, classified as an injury-based circuit, shows that the injury plus pattern rule has not been rejected so much as it simply has not been presented. *See, e.g., Rodriguez*, 917 F.2d at 667 (noting that the facts of *Bankers Trust* did not raise the issue of pattern discovery).

8 *See, e.g., Bankers Trust*, 859 F.2d at 1102; *Bingham*, 66 F.3d at 559 (Steinberg Pet. at 11a).

9. *See, e.g., Bivens*, 906 F.2d at 1553-55. As a variation of this separate accrual rule, the Third Circuit has adopted a rule which appears to be the most liberal. It allows a RICO action to be brought for all injuries so long as the last injury or last predicate act which is part of the same pattern of racketeering activity occurred within four years before the commencement of the action. *See Keystone*, 863 F.2d at 1130-31.

upon discovery that the injury was caused by a pattern of racketeering activity. However, the facts of the present case do not afford an opportunity for the Court to address this question, because the result will be the same under either test.

Petitioners apparently fail to recognize that the Second Circuit's injury-discovery rule, under which Respondent's RICO claims were held to be timely, is the more restrictive of the tests.[10] The addition of a pattern requirement can result in a date of accrual after an injury was discovered -- in which case it will be less likely for a claim to be time-barred -- but can never result in accrual before there has been an injury. Under either test a cause of action cannot accrue until the plaintiff suffers injury, the *sine qua non* of accrual. Inasmuch as all of the injuries for which the jury awarded damages to the Estate were suffered within the four-year limitations period, the addition of a pattern discovery requirement will not affect the result.

The distinction between injury-based accrual and injury and pattern-based accrual could only be properly explored by reviewing a case in which the plaintiff's injuries were or could have been discovered more than four years before suit but the pattern only became evident during the limitations period.[11] This case does not present such a scenario, and

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10. *See Agristor Fin. Corp. v. Van Sickle*, 967 F.2d 233, 241 (6th Cir. 1992) (noting that the injury and pattern discovery rule under *Bivens* is "more generous" than the injury discovery rule (referred to simply as the "discovery rule") followed by courts such as the Second Circuit (citing *Bankers Trust*).

11. This fact pattern has occurred in cases such as *Grimmett*,1996 WL 29094, and *Granite Falls*, 924 F.2d 150. In these cases the plaintiffs argued that it would be unjust to hold that their claims accrued before the RICO pattern could have been discovered. *Compare Grimmett*, 1996 WL 29094 (claim time-barred although pattern was

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would not afford an opportunity to consider, except perhaps in the abstract, what the significance of pattern-discovery should be in RICO accrual. The facts do not offer a concrete opportunity to consider the merits of the different rules, and the parties will not be in a position to air the adverse viewpoints.

This case would also not be an appropriate vehicle to resolve any circuit split because Petitioners' schemes are convoluted and unique. The courts below reached their holdings after reviewing closely the extensive factual detail regarding Petitioners' illegal schemes contained in the record. This review showed that, contrary to Petitioners' arguments, the jury did not find that the Estate had knowledge of all their wrongful acts before four years prior to suit, and that all injuries for which the jury awarded damages occurred after December 31, 1982.

Nor should the Court consider reviewing this issue prematurely, if at all. The principle that accrual should be based on discovery appears to be universally accepted and, notwithstanding differences of opinion between the circuits on some points, it is difficult to say that the results reached are inconsistent or unjust. This Court has already declined several opportunities to consider RICO accrual since the issue was left open in *Agency Holding Corp. v. Malley-Duff*

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> discovered during limitations period, because injury had been discovered earlier) *with Granite Falls*, 924 F.2d 150 (claim timely notwithstanding fact that injury and wrongful acts were discovered before limitations period, because pattern could only have been discovered within the four years before action commenced).

& Associates, Inc., 483 U.S. 143 (1987).[12] A case on more suitable facts will doubtless be presented for review in due course, if the Court is inclined to address the question.

Nor is there, as Petitioners incorrectly suggest, a conflict of authority on the principle of separate accrual for independent injuries applied by the Second Circuit. To be sure, the Third Circuit has rejected the Second Circuit's approach in favor of its more liberal "last injury" or "last predicate act" rule, under which "[i]f the complaint was filed within four years of the last injury or the last predicate act, the plaintiff may recover for injuries caused by other predicate acts which occurred outside an earlier limitations period but which were part of the same pattern." *Keystone Ins. Co. v. Houghton*, 863 F.2d 1125, 1130-31 (3d Cir. 1988). But none of the authorities cited by Petitioner Steinberg as having rejected the "separate accrual rule" (Steinberg Pet. at 12) actually rejected the principle of separate accrual for independent injuries. The cases cited by Petitioner Steinberg adopt the more liberal injury and pattern based discovery rule, using "separate accrual rule" as shorthand for the more strict injury-discovery rule they are declining to follow.[13]

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12. *See, e.g., Bontkowski v. First Nat'l Bank of Cicero*, 998 F.2d 459 (7th Cir.), *cert. denied*, 114 S. Ct. 602 (1993); *Bivens Gardens Office Bldg. Inc. v. Barnett Bank of Fla., Inc.*, 906 F.2d 1546 (11th Cir. 1990), *cert. denied*, 500 U.S. 910 (1991); *Bankers Trust Co. v. Rhoades*, 859 F.2d 1096 (2d Cir. 1988), *cert. denied*, 490 U.S. 1007 (1989).

13. *See, e.g., Bivens*, 906 F.2d at 1553 (11th Cir. 1990) ("We agree with the *Keystone* court that the 'separate accrual' rule applied by the *Bankers Trust* court fails to recognize that an injury to a plaintiff from a single predicate act does not evolve into a civil RICO injury until a 'pattern' of racketeering activity has developed."), *cert. denied*, 500 U.S. 910 (1991).

Indeed, it is clear that the rule enunciated by the Eleventh Circuit in *Bivens Gardens Office Building, Inc. v. Barnett Bank of Florida., Inc.*, 906 F.2d 1546 (11th Cir. 1990), *cert. denied*, 500 U.S. 910 (1991), the seminal injury and pattern discovery case, actually incorporates the principle of separate accrual for each independent injury. *See id.* at 1554-55 ("We hold, therefore, that with respect to each independent injury to the plaintiff, a civil RICO cause of action begins to accrue as soon as the plaintiff discovers, or reasonably should have discovered, both the existence and source of his injury and that the injury is part of a pattern.") (emphasis added). In *Bivens* the court held that although claims for some of plaintiffs' injuries were time-barred, claims for "independent subsequent injuries" were not. *See id.* at 1556-57.[14]

The other authorities Petitioners cite provide even less support for their position. Far from rejecting the principle of separate accrual, the courts in *Association of Commonwealth Claimants v. Moylan*, 71 F.3d 1398 (8th Cir. 1995) (Steinberg Pet. at 14 n.5), *Glessner v. Kenny*, 952 F.2d 702 (3d Cir. 1991) (Steinberg Pet. at 14 n.5; Zolt Pet. at 9), and *Ackerman v. National Property Analysts, Inc.*, 887 F. Supp.

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14. *See also Caproni*, 15 F.3d at 619-20 (adopting *Bivens* rule); *Granite Falls*, 924 F.2d at 154 (same); *Bath*, 913 F.2d at 820 (same); *Keystone*, 863 F.2d at 1130-31 (adopting "last predicate act" rule, under which predicate acts or injuries discovered after initial discovery of injuries and pattern revive the claim); *Podraza v. Carriero*, 212 A.D.2d 331, 630 N.Y.S.2d 163, 166-69 (4th Dep't 1995) (following *Bivens* line of cases; noting that *Bivens* rule incorporates principle of separate accrual); *cf. Klehr v. A.O. Smith Corp.*, 875 F. Supp. 1342, 1352 (D. Minn. 1995) (following *Granite Falls* and *Bivens*; "separate limitations periods may accrue from new injuries [but the] separate accrual is limited to distinct and independent injuries;" (citing *Bankers Trust*)).

494 (S.D.N.Y. 1992) (Zolt Pet. at 9), expressly acknowledged that separate causes of action could accrue for independent injuries suffered during the limitations period. *See Moylan*, 71 F.3d at 1403; *Glessner*, 952 F.2d at 707-08; *Ackerman*, 887 F. Supp. at 503-04. Indeed, the courts in *Glessner* and *Ackerman* expressly relied on the Second Circuit's decision in *Bankers Trust* for guidance. The courts in these cases simply held, as the Second Circuit did in *Long Island Lighting Co. v. IMO Industries, Inc.*, 6 F.3d 876 (2d Cir. 1993) ("*LILCO*"), that on the facts before them injuries allegedly suffered during the limitations period were not actually new or independent.

The Second Circuit's application of the separate accrual principle was not, as Petitioner Zolt asserts (Zolt Pet. at 9), confusing or contradictory. After a close review of the details of Petitioners' schemes, the Court determined that the injuries suffered by the Estate during the four years prior to commencement were caused by additional wrongful acts which took place during that period, and were therefore "new and independent" within the rule established by *Bankers Trust*. This determination distinguished the case here from that addressed by the Second Circuit in *LILCO*. *See Bingham*, 66 F.3d at 559-61 (Steinberg Pet. at 11a-15a).

Since there is no circuit split in relation to the principle of separate accrual, there is no need or reason for the Court to review the Second Circuit's fact-intensive determination on this point. Indeed, the highly factual nature of this issue itself militates against disturbing the decisions below.

B. The RICO Claim Was Not Time-Barred Under The Rules Advocated By Petitioners.

Petitioners argue that RICO accrual should be governed by the "discovery rule," claiming Respondent's RICO claim would be time-barred if this rule were applied. (Steinberg Pet. at 14; Zolt Pet. at 11.) Petitioners do not explain what

they mean by the "discovery rule," failing to acknowledge that all of the prevailing accrual rules, including the Second Circuit's, are already based on discovery.[15] The reason for this vagueness is not hard to fathom. Because the jury found that Respondent's RICO injuries were suffered within the four-year limitations period before the action was commenced, the RICO claims would only be time-barred if a RICO cause of action could accrue before a plaintiff has been injured. Not surprisingly, none of the prevailing tests would allow such a result. Injury is one of the essential elements of a RICO cause of action, *see* 18 U.S.C. §§ 1962(c) & 1964(c), (1984); *Sedima S.P.R.L. v. IMREX Co.*, 473 U.S. 479, 496 (1985), and it would be absurd to suggest that a cause of action can accrue with respect to an injury not yet suffered by a plaintiff.

Petitioner Steinberg's suggestion that Respondent's RICO claim would be time-barred under *La Porte Construction Co. v. Bayshore National Bank*, 805 F.2d 1254 (5th Cir. 1986) (Steinberg Pet. at 13-14), is puzzling. The rule applied in *La Porte* appears to be identical to the injury-based discovery rule followed by the Second Circuit here. Certainly nothing in *La Porte* suggests that a RICO cause of action should accrue when wrongful acts are discovered, regardless of when (or whether) they cause injury.[16]

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15. It is telling that Petitioner Steinberg relies on *La Porte*, 805 F.2d 1254, an injury discovery case, for his "discovery rule" (Steinberg Pet. at 14), while Petitioner Zolt relies on *Bivens*, 906 F.2d 1546, the seminal injury plus pattern case, for his "discovery rule." (Zolt Pet. at 11.)

16. In *La Porte* the alleged wrongful acts consisted of misappropriations of funds, *see* 805 F.2d at 1256, as to which the injury (loss of the funds) would have been discovered at the same time as the wrongful acts themselves. The Second Circuit cited *La Porte* as an injury-

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Petitioner Zolt's reliance on *Bivens*, 906 F.2d 1546 (Zolt Pet. at 11), is equally peculiar. *Bivens* is the seminal case for the injury and pattern based discovery rule. *See id.* at 1554 ("with respect to a plaintiff injured by one or more predicate acts, a civil RICO cause of action for damages will not accrue until the plaintiff knows, or should have known, of his injury and that the injury is part of a pattern of racketeering activity"). Judged by this test, Respondent's RICO claim was also unquestionably timely.

Petitioners' real disagreement is not with the law applied by the Second Circuit but the facts found by the jury. Their limitations argument is predicated on a fundamental misstatement of the record, i.e. that the jury found all Petitioners' wrongful acts and resulting injuries to have been committed and discovered outside the limitations period. The jury and the courts below rightly rejected this argument. Instead they found that Petitioners' periodic diversions of royalties and other funds owed to the Marley Estate constituted independent predicate acts of wire fraud, mail fraud and interstate transportation of stolen property which continued over the entire five year period prior to commencement of suit, and awarded damages only for those

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based discovery case. *See Bingham*, 66 F.3d at 559 (Steinberg Pet. 112). It may also be questionable whether *La Porte*, which was decided without the guidance provided by this Court in *Agency Holding Corp. v. Malley-Duff & Associates, Inc.*, 483 U.S. 143 (1987), still represents the law of the Fifth Circuit. In *Crowe v. Smith*, 856 F. Supp. 1178 (W.D. La. 1994), the court did not follow *La Porte* but adopted the Third Circuit's last predicate act rule, under which Respondent's claims would undoubtedly be timely. *See id.* at 1181-85.

injuries occurring within four years of the commencement of the action.

II. RICO'S CONSTITUTIONALITY IS NOT IN DOUBT.

A. No Court Has Seriously Questioned RICO's Constitutionality.

The initial reservation expressed by Justice Scalia in his concurrence in *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229 (1989), is the only chink in an otherwise solid wall of authorities that have found RICO's pattern requirement to pass constitutional muster. The ten circuits, including the court below, that have considered the constitutionality of the pattern requirement have upheld it,[17] as have almost all district courts that have addressed the issue.[18] The one contrary case cited by Petitioner Steinberg

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17. *See United States v. Oreto*, 37 F.3d 739, 752 (1st Cir. 1994), *cert. denied*, 115 S. Ct. 1161 (1995); *Bingham v. Zolt*, 66 F.3d 553, 556 (2d Cir. 1995), *petitions for cert. filed*, 64 U.S.L.W. 3561 (U.S. Feb. 5, 1996) (No. 95-1245), 64 U.S.L.W. 3561 (U.S. Feb. 9, 1996) (No. 95-1276); *United States v. Woods*, 915 F.2d 854, 863 (3d Cir. 1990), *cert. denied*, 499 U.S. 947 (1991); *United States v. Bennett*, 984 F.2d 597, 606 (4th Cir.), *cert. denied*, 113 S. Ct. 2428 (1993); *United States v. Krout*, 66 F.3d 1420, 1432 (5th Cir. 1995), *cert. denied*, 64 U.S.L.W. 3559 (U.S. Feb. 20, 1996); *United States v. Tripp*, 782 F.2d 38, 42 (6th Cir.), *cert. denied*, 475 U.S. 1128 (1986); *United States v. Ashman*, 979 F.2d 469, 487 (7th Cir. 1992), *cert. denied*, 114 S. Ct. 62 (1993); *United States v. Dischner*, 974 F.2d 1502, 1509-10 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 1290 (1993); *Cox v. Administrator U.S. Steel & Carnegie*, 17 F.3d 1386, 1398 (11th Cir. 1994), *cert. denied*, 115 S. Ct. 900 (1995); *United States v. Swiderski*, 593 F.2d 1246, 1249 (D.C. Cir. 1978), *cert. denied*, 441 U.S. 993 (1979).

18. *See NOW v. Scheidler*, 897 F. Supp. 1047, 1089 (N.D. Ill. 1995); *United States v. Wei*, 862 F. Supp. 1129, 1139 (S.D.N.Y. 1994);

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was reversed on appeal. *See Columbia Natural Resources, Inc. v. Tatum*, 58 F.3d 1101 (6th Cir. 1995) (reversing unreported district court decision which dismissed RICO claim on vagueness ground), *petition for cert. filed*, 64 U.S.L.W. 3427 (U.S. Dec. 4, 1995) (No. 95-880). Nor have challenges to the constitutionality of RICO's enterprise requirement met with success.[19] This Court has routinely

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Corporacion Insular de Seguros v. Reyes Munoz, 826 F. Supp. 599, 607 (D.P.R. 1993); *Bingham v. Zolt*, 823 F. Supp. 1126, 1132 (S.D.N.Y. 1993), *aff'd*, 66 F.3d 553 (2d Cir. 1995); *United States v. Crosby*, 789 F. Supp. 440, 442 (D.D.C. 1992), *aff'd*, 20 F.3d 480, *cert. denied*, 115 S. Ct. 221 (1994); *Schrag v. Dinges*, 788 F. Supp. 1543, 1553-54 (D. Kan. 1992); *United States v. Eisenberg*, 773 F. Supp. 662, 729-30 (D.N.J. 1991); *In re Crazy Eddie Sec. Litig.*, 747 F. Supp. 850, 863 (E.D.N.Y. 1990); *United States v. Busacca*, 739 F. Supp. 370, 378 (N.D. Ohio 1990), *aff'd*, 936 F.2d 232 (6th Cir.), *cert. denied*, 502 U.S. 985 (1991); *Beck v. Edward D. Jones & Co.*, 735 F. Supp. 903, 906-07 (C.D. Ill. 1990); *United States v. Thevis*, 474 F. Supp. 134, 139 (N.D. Ga. 1979), *aff'd*, 665 F.2d 616 (5th Cir.), *cert. denied*, 459 U.S. 825 (1982); *United States v. Stofsky*, 409 F. Supp. 609, 614 (S.D.N.Y. 1973).

19. *See Bingham v. Zolt*, 66 F.3d at 566; *United States v. Freeman*, 6 F.3d 586, 597 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 1661 (1994); *United States v. Dischner*, 974 F.2d 1502, 1511 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 1290 (1993); *United States v. Coonan*, 938 F.2d 1553, 1561-62 (2d Cir. 1991), *cert. denied*, 503 U.S. 941 (1992);*United States v. Wei*, 862 F. Supp. 1129, 1139 (S.D.N.Y. 1994); *United States v. Paccione*, 738 F. Supp. 691, 696-98 (S.D.N.Y. 1990); *United States v. Boffa*, 513 F. Supp. 444, 462-63 (D. Del. 1980); *United States v. Thevis*, 474 F. Supp. 134, 139 (N.D. Ga. 1979), *aff'd*, 665 F.2d 616 (5th Cir.), *cert. denied*, 459 U.S. 825 (1982).

declined to review cases challenging RICO on these grounds.[20]

There is no merit to Petitioner's suggestion that the lower courts have had trouble applying the pattern requirement. In *Sedima, S.P.R.L. v. IMREX Co.*, 473 U.S. 479 (1985), and *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229 (1989), this Court instructed the lower courts to consider whether there was continuity plus relationship among predicate acts in order to determine whether they formed a RICO pattern. Although this formula is not, as Justice Scalia pointed out in *H.J.*, mathematically precise, Petitioner does not put forward any evidence to show that the lower courts have had trouble following this Court's guidance.[21] Indeed, since *H.J.*, the district courts have had

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20. *See United States v. Oreto*, 37 F.3d 739 (1st Cir. 1994), *cert. denied*, 115 S. Ct. 1161 (1995); *United States v. Bennett*, 984 F.2d 597 (4th Cir.), *cert. denied*, 113 S. Ct. 2428 (1993); *United States v. Freeman*, 6 F.3d 586 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 1661 (1994); *United States v. Dischner*, 974 F.2d 1502 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 1290 (1993); *Abell v. Potomac Ins. Co. of Ill.*, 946 F.2d 1160 (5th Cir. 1991), *cert. denied*, 504 U.S. 911 (1992); *United States v. Coiro*, 922 F.2d 1008 (2d Cir.), *cert. denied*, 501 U.S. 1217 (1991); *United States v. Coonan*, 938 F.2d 1553 (2d Cir. 1991), *cert. denied*, 503 U.S. 941 (1992); *United States v. Glecier*, 923 F.2d 496 (7th Cir.), *cert. denied*, 502 U.S. 810 (1991); *United States v. Angiulo*, 897 F.2d 1169 (1st Cir.), *cert. denied*, 498 U.S. 845 (1990); *United States v. Pungitore*, 910 F.2d 1084 (3d Cir. 1990), *cert. denied*, 500 U.S. 915 (1991); *United States v. Woods*, 915 F.2d 854 (3d Cir. 1990), *cert. denied*, 499 U.S. 947 (1991); *United States v. Ruggiero*, 726 F.2d 913 (2d Cir.), *cert. denied*, 469 U.S. 831 (1984); *United States v. Morelli*, 643 F.2d 402 (6th Cir.), *cert. denied*, 453 U.S. 912 (1981); *United States v. Swiderski*, 593 F.2d 1246 (D.C. Cir. 1978), *cert. denied*, 441 U.S. 933 (1979).

21. Petitioner cites the Third Circuit's divided opinion in *Tabas v. Tabas*, 47 F.3d 1280 (3d Cir.) (*en banc*), *cert. denied*, 115 S. Ct.

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little trouble distinguishing cases where a pattern is present from cases where one is not.[22] That the lower courts have

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2269 (1995), to show that there is intolerable confusion on the proper application of the pattern requirement. This Court apparently did not share Petitioner's view of *Tabas*, since it declined to review that case.

22. Recent district court cases finding a "pattern" include: *Fried v. Sungard Recovery Services, Inc.*, 900 F. Supp. 758, 764 (E.D. Pa. 1995); *Brooke v. Schlesinger*, 898 F. Supp. 1076, 1084 (S.D.N.Y. 1995); *Lui Ciro, Inc. v. Ciro, Inc.*, 895 F. Supp. 1365, 1383 (D. Haw. 1995); *D'Orange v. Feely*, 894 F. Supp. 159, 163 (S.D.N.Y. 1995); *Water Int'l Network U.S.A., Inc. v. East*, 892 F. Supp. 1477, 1482 (M.D. Fla. 1995); *Trustees of Plumbers & Pipefitters Nat'l Pension Fund v. Transworld Mechanical, Inc.*, 886 F. Supp. 1134 (S.D.N.Y. 1995); *Lavian v. Haghnazari*, 884 F. Supp. 670, 683 (E.D.N.Y. 1995); *Arenson v. Whitehall Convalescent & Nursing Home, Inc.*, 880 F. Supp. 1202, 1211 (N.D. Ill. 1995); *Rohland v. Syn-Fuel Associates--1982 Ltd. Partnership*, 879 F. Supp. 322, 334 (S.D.N.Y. 1995); *Lemelson v. Wang Labs., Inc.*, 874 F. Supp. 430, 434 (D. Mass. 1994); *Shuttlesworth v. Housing Opportunities Made Equal*, 873 F. Supp. 1069, 1077 (S.D. Ohio 1994); *Tribune Co. v. Purcigliotti*, 869 F. Supp. 1076, 1096 (S.D.N.Y. 1994), *aff'd* 66 F.3d 12 (2d Cir. 1995); and *Corporacion Insular de Seguros v. Reyes Munoz*, 849 F. Supp. 126, 134 (D.P.R. 1994).

Recent district court cases finding no "pattern" include: *Gruntal & Co., Inc. v. San Diego Bancorp*, 901 F. Supp. 607, 617 (S.D.N.Y. 1995); *Davis v. Hudgins*, 896 F. Supp. 561, 569 (E.D. Va. 1995); *Trustees of Plumbers & Pipefitters Nat'l Pension Fund v. De-Con Mechanical Contractors, Inc.*, 896 F. Supp. 342, 349 (S.D.N.Y. 1995); *Thai Airways Int'l Ltd.v. United Aviation Leasing B.V.*, 891 F. Supp. 113, 119 (S.D.N.Y. 1994), *aff'd*, 59 F.3d 20 (1995); *Wobble Light, Inc. v. McLain/Smigiel Partnership*, 890 F. Supp. 721, 724 (N.D. Ill. 1995); *Bonton v. Archer Chrysler Plymouth, Inc.*, 889 F. Supp. 995, 1004 (S.D. Tex. 1995); *Food Lion v. Capital Cities/ABC, Inc.*, 887 F. Supp. 811, 820 (M.D.N.C. 1995); *Rini v. Zwirn*, 886 F. Supp. 270, 294 (E.D.N.Y. 1995); *DeWit v. Firstar*

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been successfully determining whether a "pattern" exists belies Petitioner's suggestion that the requirement is vague.[23]

B. Petitioner Steinberg Makes No Showing That RICO Is Unconstitutional As Applied To Him.

Even if there were some basis for challenging the constitutionality of RICO, Petitioner Steinberg makes no attempt to show how the pattern or enterprise requirements were unconstitutional as applied to him in this action.[24] This omission is not surprising, considering the extent of Petitioners' wrongdoing and the obvious applicability of RICO.

As Petitioner Steinberg concedes, the fundamental purpose of the void for vagueness doctrine is to ensure that an offense is defined "with sufficient definiteness that

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Corp., 879 F. Supp. 947, 970 (N.D. Iowa 1995); *Pemberton Sales & Services, Inc. v. Banco Popular de Puerto Rico*, 877 F. Supp. 961, 970 (D.V.I. 1994); *Mathon v. Marine Midland Bank, N.A.*, 875 F. Supp. 986, 998 (E.D.N.Y. 1995); *Bowdoin Constr. Corp. v. Rhode Island Hosp. Trust Nat'l Bank*, 869 F. Supp. 1004 (D. Mass. 1994); *Trans World Airlines, Inc. v. Berger*, 864 F. Supp. 106, 109 (E.D. Mo. 1994); *Gotham Print, Inc. v. American Speedy Printing Ctrs., Inc.*, 863 F. Supp. 447, 458 (E.D. Mich. 1994); and *Harris Custom Builders Inc. v. Hoffmeyer*, 834 F. Supp. 256, 260 (N.D. Ill. 1993).

23. Indeed, it was the guidance provided in *H.J.* that caused the district court to reverse its initial ruling that the enterprise requirement was not properly alleged in this case.

24. In the absence of First Amendment considerations, vagueness challenges must be evaluated based on the particular application of the statute and not "on the ground that [the statute] may conceivably be applied unconstitutionally to others in situations not before the Court." *New York v. Ferber*, 458 U.S. 747, 767 (1982).

ordinary people can understand what conduct is prohibited." (Steinberg Pet. at 18 (quoting *Kolender v. Lawson*, 461 U.S. 352, 357 (1983)). Having conspired to commit the forgery and dozens of acts of common law fraud, mail fraud, wire fraud and interstate transportation of stolen property over a period of five years, Petitioners cannot seriously claim to have been surprised to have been found guilty of racketeering. This is especially so in the case of Petitioner Steinberg, who raises this issue, and whose wrongdoing was sufficiently clear to him to cause him to invoke his Fifth Amendment rights before the jury. Recent observations of the Sixth Circuit are apt:

> If one can take the time to avoid committing mail or wire fraud, or extortion, or murder, or any of the other enumerated predicate offenses, all of which are federal or state criminal offenses in their own right, then one can sleep safe in the knowledge that he will not be found to have violated RICO.
>
> The issue, bluntly and simply framed, is whether a person of ordinary intelligence would know that committing dozens if not hundreds of acts of wire and mail fraud, over the course of almost a decade against the same victim, might constitute a pattern of racketeering activity. Since, by its terms it only takes a minimum of two acts, it is simply implausible for a party to claim that it was not aware that committing numerous predicate acts would expose it to potential RICO liability.

Columbia Natural Resources, 58 F.3d at 1108-09.

There can be no reasonable doubt that Petitioners' conduct showed the requisite degree of continuity and relatedness to meet the standard for a RICO pattern under *Sedima* and *H.J.* The trial evidence showed that Petitioners' schemes were closely intertwined, were pursued continuously

over a five year period, and were all directed to one single goal: diverting funds that rightly belonged to the Marley Estate. Nor has Petitioner Steinberg suggested any reason why this Court's broad definition of a RICO enterprise, *see United States v. Turkette*, 452 U.S. 576 (1981), was not met here. In short, Petitioner's unsupported arguments against the constitutionality of RICO are wholly unpersuasive.

III. PETITIONER ZOLT'S PROCEDURAL OBJECTIONS DO NOT MERIT REVIEW.

Petitioner Zolt raises a number of additional objections to the procedures employed by the district court at trial. The Second Circuit found these largely to be based on misrepresentations of the record or matters that were well within the district court's discretion.

As explained in the Second Circuit's opinion, *Bingham*, 66 F.3d at 562-63 (Steinberg Pet. at 19a-21a), there was no inconsistency in the jury's findings and is no basis for arguing that the district court abused its discretion in declining to ask further questions of the jury. Nor has Petitioner suggested any reason why this supposed error would be worthy of certiorari. Petitioner's real complaint may be with the form of the interrogatories presented to the jury. (Zolt Pet. at 6-7, 9 n.2, 12-13.) Since neither Petitioner Zolt nor any other defendant objected to the special verdict sheet at the charge conference, this issue was not preserved for appeal. *See* Fed. R. Civ. P. 49(a); *Metromedia Co. v. Fugazy*, 983 F.2d 350, 363 (2d Cir. 1992), *cert. denied*, 113 S. Ct. 2445 (1993).

Petitioner Zolt cites no case supporting his assertion that the Seventh Amendment guarantees a right to jury trial on the amount of attorneys fees awarded a successful litigant

pursuant to a statute. The courts have routinely rejected this argument.[25] In the only case cited by Petitioner, *Curtis v. Loether*, 415 U.S. 189 (1974), the Court held that the Seventh Amendment right is only activated if a party is pursuing a statutory claim for money damages, the traditional remedy in an action at law. *Curtis* had nothing to do with attorneys fees, and the Court plainly rejected the broad proposition for which Petitioner cites it, i.e. that there is a right to a jury trial whenever any statutory entitlement is enforced. *See id.* at 192-94.[26]

Petitioner Zolt's further attacks on the fairness of the trial raise no discernible issue -- let alone one requiring this Court's attention. Petitioner asserted nearly identical contentions before the Second Circuit, which made a careful review of the record before holding that "[a]ll of Zolt's contentions are factually baseless and, further, go to the discretionary conduct of a trial by the district judge."

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25. *See, e.g., Cleverly v. Western Elec. Co. Inc.*, 450 F. Supp. 507 (W.D. Mo. 1978), *aff'd*, 594 F.2d 638 (8th Cir. 1979); *Swofford v. B&W Inc.*, 336 F.2d 406 (5th Cir. 1964), *cert. denied*, 379 U.S. 962 (1965); *Empire State Ins. Co. v. Chafetz*, 302 F.2d 828 (5th Cir. 1962); *Younis Brothers & Co. v. Cigna Worldwide Ins. Co.*, 882 F. Supp. 1468 (E.D. Pa. 1994); *Griffin v. United States Postal Service*, 635 F. Supp. 190 (N.D. Ga. 1986).

26. Petitioner Zolt also misstates the record when he asserts that the district court awarded fees "in summary fashion," based on an affidavit alone. (Zolt Pet. at 15.) The voluminous materials submitted to the court in support of the fee application included a detailed accounting, supported by affidavit, of over 500 pages taken directly from the computer printouts of the time records of Respondent's attorneys. Petitioner was given an ample opportunity to challenge the sum sought, which was ultimately reduced 15% by the district court. *Bingham*, 66 F.3d at 565-66 (Steinberg Pet. at 25a-27a).

Bingham, 66 F.3d at 566 (Steinberg Pet. at 27a-28a). Respondent respectfully refers the Court to the Second Circuit's discussion of the fairness of Petitioner Zolt's treatment by the trial court. *See id.* at 566 (Steinberg Pet. at 27a-28a).

CONCLUSION

For the foregoing reasons, the petitions for a writ of certiorari should be denied.

Dated: New York, New York
March 5, 1996

Respectfully submitted,

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